

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHRISTOPHER MILTON WAYNE
BOSARGE,

Plaintiff,

v.

CLYDE BROWN, DEPARTMENT OF
CORRECTIONS,

Defendants.

Case No. C21-5210 BHS-TLF

ORDER TO SHOW CAUSE OR
AMEND THE COMPLAINT

This matter is before the Court on plaintiff's filing of a civil rights complaint under 42 U.S.C. Section 1983. Dkt. 9. Plaintiff Christopher Milton Wayne Bosarge has been granted *in forma pauperis* status in this matter and is proceeding *pro se*. Dkt. 8.

Considering deficiencies in the complaint discussed below, the Court will not direct service of the complaint at this time. On or before April 7, 2022, plaintiff must either show cause why this cause of action should not be dismissed or file an amended complaint.

BACKGROUND

Plaintiff is incarcerated at the Olympic Corrections Center. He seeks \$1,500,000 in damages for his pain and suffering from the Department of Corrections ("DOC") and a corrections officer, Clyde Brown. Dkt. 9 at 9. Plaintiff alleges that on April 4, 2019, Mr. Brown called Plaintiff a "sex offender" while Plaintiff was waiting in the lunch mainline.

1 *Id.* at 4-5. This caused Plaintiff to be placed in “immediate harm and cause for violent
 2 attack by other inmates.” *Id.* at 5. Plaintiff claims that he filed a grievance, but it was not
 3 “taken seriously.” *Id.* at 6. As a result of Mr. Brown’s comment and DOC’s failure to act
 4 on the grievance, Plaintiff alleges his Eighth Amendment and Fourteenth Amendment
 5 rights were violated. *Id.*

6 DISCUSSION

7 The Court declines to serve the complaint because it contains deficiencies that, if
 8 not addressed, might lead to a recommendation of dismissal of the entire action for
 9 failure to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915(e)(2)(b)(ii),
 10 1915A(b)(1).

11 The Court must dismiss the complaint of a prisoner proceeding *in forma pauperis*
 12 “at any time if the [C]ourt determines” that the action: (a) “is frivolous or malicious”; (b)
 13 “fails to state a claim on which relief may be granted” or (c) “seeks monetary relief
 14 against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2); 28 U.S.C.
 15 § 1915A(a), (b). A complaint is frivolous when it has no arguable basis in law or fact.
 16 *Franklin v. Murphy*, 745 F.3d 1221, 1228 (9th Cir. 1984).

17 Before the Court may dismiss the complaint as frivolous or for failure to state a
 18 claim, though, it “must provide the [prisoner] with notice of the deficiencies of his or her
 19 complaint and an opportunity to amend the complaint prior to dismissal.” *McGucken v.*
 20 *Smith*, 974 F.2d 1050, 1055 (9th Cir. 1992); *see also Sparling v. Hoffman Constr., Co.,*
 21 *Inc.*, 864 F.2d 635, 638 (9th Cir. 1988); *Noll v. Carlson*, 809 F.2d 1446, 1449 (9th Cir.
 22 1987). On the other hand, leave to amend need not be granted “where the amendment
 23
 24
 25

1 would be futile or where the amended complaint would be subject to dismissal.” *Saul v.*
2 *United States*, 928 F.2d 829, 843 (9th Cir. 1991).

3 To state a claim under 42 U.S.C. § 1983, a complaint must allege: (1) the
4 conduct complained of was committed by a person acting under color of state law, and
5 (2) the conduct deprived a person of a right, privilege, or immunity secured by the
6 Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).
7 Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these
8 elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985).

9 **A. Improper Defendant – DOC**

10 The complaint brings claims against the Washington State Department of
11 Corrections, which is an improper defendant in a Section 1983 action. Neither states,
12 nor that are arms of the state, such as the DOC, are “persons” for purposes of Section
13 1983. *Howlett v. Rose*, 496 U.S. 356, 365–66 (1990); *Hale v. Arizona*, 993 F.2d 1387,
14 1398 (9th Cir. 1993) (en banc). Accordingly, Plaintiff may not bring claims under Section
15 1983 against DOC.

16 **B. Equal Protection**

17 Plaintiff alleges that Mr. Brown’s actions caused him to be “singled out” and “face
18 discrimination” amounting to a violation of the Equal Protection Clause. Dkt. 9 at 5.

19 “To state a claim under § 1983 for a violation of the Equal Protection Clause of
20 the Fourteenth Amendment a plaintiff must show that the defendants acted with intent to
21 discriminate against the plaintiff based upon membership in a protected class.” *Lee v.*
22 *City of Los Angeles*, 250 F.3d 668, 686 (9th Cir.2001) (quoting *Barren v. Harrington*,

1 152 F.3d 1193, 1194 (9th Cir.1998)). It is unclear from Plaintiff's complaint how Mr.
2 Brown's comment implicated plaintiff's identification as a member of a protected class.

3 Alternatively, when an action does not implicate a protected class such a race or
4 religion, a plaintiff may establish a "class of one" equal protection claim by alleging that
5 he has been intentionally treated differently from others similarly situated without any
6 rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S.
7 562, 564 (2000) (per curiam); *Squaw Valley Development Co. v. Goldberg*, 375 F.3d
8 936, 944 (9th Cir. 2004), *overruled on other grounds by Action Apt. Ass'n v. Santa*
9 *Monica Rent Control Bd.*, 509 F.3d 1020, 1025 (9th Cir. 2007). To "be considered
10 similarly situated, the class of one challenger and his comparators must be prima facie
11 identical in all relevant respects or directly comparable in all material respects."
12 *Warkentine v. Soria*, 152 F. Supp. 3d 1269, 1294 (E.D. Cal. 2016) (quoting *U.S. v.*
13 *Moore*, 543 F.3d 891, 896 (7th Cir. 2008)); *see also Nordlinger v. Hahn*, 505 U.S. 1, 10
14 (1992).

15 If plaintiff intends to pursue an equal protection claim, he should include all of his
16 factual allegations against specifically named defendants in one section of his amended
17 complaint.

18 **C. Eighth Amendment**

19 The Eighth Amendment's prohibition against cruel and unusual punishment
20 imposes duties on prison officials to "provide humane conditions of confinement."
21 *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). "[P]rison officials must ensure that
22 inmates receive adequate food, clothing, shelter, and medical care." *Id.* Usually, a more
23 offensive condition will be of constitutional significance when it exists for even a short
24
25

1 time, while a less offensive condition will be of constitutional significance only when it
2 has existed for a much longer time.

3 Establishing a violation of the Eighth Amendment requires a two-part showing.
4 First, an inmate must objectively show that he was deprived of something “sufficiently
5 serious.” *Farmer*, 511 U.S. at 834. A deprivation is sufficiently serious when the prison
6 official’s act or omission results “in the denial of ‘the minimal civilized measure of life’s
7 necessities.’” *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The inmate
8 must then make a subjective showing that the deprivation occurred with deliberate
9 indifference to the inmate’s health or safety. *Id.* (citing *Wilson v. Seiter*, 501 U.S. 294,
10 302-03 (1991)).

11 In this case, Plaintiff does not allege a serious harm or an offensive condition. Nor
12 does he allege that he was deprived of something sufficiently serious. Plaintiff allegation
13 against Mr. Brown amounts to an inappropriate comment. Allegations of verbal
14 harassment and abuse fail to state a claim cognizable under 42 U.S.C. § 1983. See
15 *Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997); *Rutledge v. Arizona Bd. Of*
16 *Regents*, 660 F.2d 1345, 1353 (9th Cir. 1981), *aff’d sub nom. Kush v. Rutledge*, 460
17 U.S. 719 (1983); see, e.g., *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996),
18 amended 135 F.3d 1318 (9th Cir. 1998) (disrespectful and assaultive comments by
19 prison guard not enough to implicate 8th Amendment); *Oltarzewski v. Ruggiero*, 830
20 F.2d 136, 139 (9th Cir. 1987) (directing vulgar language at prisoner does not state
21 constitutional claim).

1 Further, to the extent Plaintiff alleges that Mr. Brown acted negligently, neither
2 negligence nor gross negligence is actionable under § 1983 in the prison context. See
3 *Farmer*, 511 U.S. at 835–36 & n. 4.

4 Based on the foregoing, the Court finds that Plaintiff has failed to state a claim for
5 violation of the Eighth Amendment.

6 **D. Due Process**

7 Plaintiff appears to be alleging that the DOC violated his right to due process by
8 not disciplining Mr. Brown for violating DOC policy after plaintiff filed a grievance. Dkt. 9
9 at 6. Plaintiff cannot state a cognizable claim under Section 1983 for failure to process
10 grievances because prisoners have no stand-alone due process rights related to the
11 administrative grievance process. *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988);
12 *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003); *Wright v. Shapirshteyn*, 2009 WL
13 361951, at *3 (E.D. Cal. Feb. 12, 2009) (“[W]here a defendant's only involvement in the
14 allegedly unconstitutional conduct is the denial of administrative **grievances**, the failure
15 to intervene on a prisoner's behalf to remedy alleged unconstitutional behavior does not
16 amount to active unconstitutional behavior for purposes of § 1983.”). As there is no right
17 to any particular grievance process, it is impossible for Plaintiff's due process rights to
18 have been violated by ignoring his grievances or failing to properly process them.

19 **E. Failure to Follow Department Policy**

20 Plaintiff alleges throughout his complaint that Mr. Brown violated DOC Policy
21 350.030 when Mr. Brown called Plaintiff a “sex offender.” Dkt. 9 at 5. It is unclear
22 whether plaintiff is bringing a separate claim against Mr. Brown for this alleged violation.
23 To the extent plaintiff attempts to claim a violation of right when he contends Mr. Brown
24
25

1 violated department policy, this claim is not cognizable. This is because alleged
2 violations of prison policy – without more -- do not state a claim for any violation of
3 federal constitutional rights, or federal statutory rights, and therefore are not actionable
4 allegations under Section 1983. See *generally* 28 U.S.C. § 1983; see *Cousins v.*
5 *Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009).

6 **F. Appointment of Counsel**

7 Plaintiff filed a motion for the appointment of counsel. Dkt. 10. No constitutional
8 right exists to appointed counsel in a Section 1983 action. *Storseth v. Spellman*, 654
9 F.2d 1349, 1353 (9th Cir. 1981). In “exceptional circumstances,” the Court may appoint
10 counsel for indigent civil litigants pursuant to 28 U.S.C. § 1915(e)(1)). *Rand v. Roland*,
11 113 F.3d 1520, 1525 (9th Cir. 1997), *overruled on other grounds*, 154 F.3d 952 (9th Cir.
12 1998).

13 To decide whether exceptional circumstances exist, the Court must evaluate both
14 “the likelihood of success on the merits [and] the ability of the petitioner to articulate his
15 claims *pro se* in light of the complexity of the legal issues involved.” *Wilborn v.*
16 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir.1986) (quoting *Weygandt v. Look*, 718 F.2d
17 952, 954 (9th Cir. 1983)). A plaintiff must plead facts that show he has an insufficient
18 grasp of his case or the legal issue(s) involved, as well as an inadequate ability to
19 articulate the factual basis of his claim. *Agyeman v. Corrections Corp. of America*, 390
20 F.3d 1101, 1103 (9th Cir. 2004). That a *pro se* litigant may be better served with the
21 assistance of counsel is not the test. *Rand*, 113 F.3d at 1525.

22 Plaintiff did not provide any explanation in his motion to demonstrate why an
23 exceptional circumstance exists in his case. Plaintiff has successfully filed his complaint
24
25

1 and has demonstrated an adequate ability to articulate factual and legal basis of his
2 claims, even though, as discussed above, the complaint in its current form is deficient

3 At this point it is premature to assess the likelihood of success on the merits or
4 whether the issues in this case are necessarily complex. In sum, Plaintiff has failed in
5 his burden to demonstrate an inability to present his claims to this Court without counsel
6 at this time. Plaintiff's request for the appointment of counsel is therefore **DENIED**.

7 However, the denial is without prejudice and another request may be brought if
8 circumstances change as this litigation progresses.

9 CONCLUSION

10 Plaintiff's motion for appointment of counsel is DENIED without prejudice. Due to
11 the deficiencies described above, the Court will not serve the complaint. Plaintiff may
12 show cause why his complaint should not be dismissed – or, plaintiff may file an
13 amended complaint to cure, if possible, the deficiencies noted herein. The deadline for
14 filing a response stating why his complaint should not be dismissed, or for filing an
15 amended complaint -- is **on or before April 7, 2022**.

16 If an amended complaint is filed, it must be legibly rewritten or retyped in its
17 entirety and contain the same case number. Any cause of action alleged in the original
18 complaint that is not alleged in the amended complaint is waived. *Forsyth v. Humana,*
19 *Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), *overruled in part on other grounds, Lacey v.*
20 *Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012).

21 The Court will screen the amended complaint to determine whether it states a
22 claim for relief cognizable under 42 U.S.C. § 1983. If the amended complaint is not
23 timely filed or fails to adequately address the issues raised herein, the undersigned will
24
25

1 recommend dismissal of this action as frivolous under 28 U.S.C. § 1915, and the
2 dismissal will count as a “strike” under 28 U.S.C. § 1915(g). Plaintiff should be aware
3 that a prisoner who brings three or more civil actions or appeals that are dismissed on
4 the grounds that they are legally frivolous, malicious, or fail to state a claim, will be
5 precluded from bringing any other civil action or appeal *in forma pauperis*, “unless the
6 prisoner is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

7 The Clerk is directed to send Plaintiff the appropriate forms for filing a 42 U.S.C.
8 § 1983 civil rights complaint and for service, a copy of this Order and the *Pro Se*
9 Information Sheet.

10 Dated this 10th day of March, 2022.

11
12
13 

14 Theresa L. Fricke
15 United States Magistrate Judge
16
17
18
19
20
21
22
23
24
25